

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PHILLIP DEWITT,

Plaintiff,

v.

CAROLYN W. COLVIN,

Defendant.

NO: 13-CV-3025-FVS

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 15 and 16. This matter was submitted for consideration without oral argument. Plaintiff was represented by Cory J. Brandt. Defendant was represented by Christopher J. Brackett. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. For the reasons discussed below, the Court grants Plaintiff's Motion for Summary Judgment and denies Defendant's Motion for Summary Judgment.

JURISDICTION

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~ 1

1 Plaintiff Phillip F. DeWitt protectively filed for disability insurance benefits
2 and supplemental security income (“SSI”) on January 16, 2009. Tr. 142-47. In both
3 applications, Plaintiff initially alleged an onset date of May 1, 2004, but at the
4 hearing Plaintiff amended the alleged onset date to March 1, 2006. Tr. 74-75.
5 Benefits were denied initially and upon reconsideration. Tr. 91-97, 84-88. Plaintiff
6 requested a hearing before an administrative law judge (“ALJ”), which was held
7 before ALJ James W. Sherry on October 26, 2011. Tr. 41-76. Plaintiff was
8 represented by counsel and testified at the hearing. Tr. 46-62. Vocational expert
9 Debra LaPoint also testified. Tr. 62-73. The ALJ denied benefits (Tr. 16-34) and
10 the Appeals Council denied review. Tr. 1. The matter is now before this court
11 pursuant to 42 U.S.C. § 405(g).

12 **STATEMENT OF FACTS**

13 The facts of the case are set forth in the administrative hearing and
14 transcripts, the ALJ’s decision, and the briefs of Plaintiff and the Commissioner,
15 and will therefore only be summarized here.

16 Plaintiff was 37 years old at the time of the hearing. Tr. 46. He completed
17 twelfth grade education and one year of college. Tr. 47. He completed a basic
18 computing course in 1999-2000. Tr. 48. He served in the Navy from 1995-1988
19 and was honorably discharged. Tr. 48. He receives military disability for a cyst
20 removed from his hand, and has limitations in his hand and groin. Tr. 49. He

1 received two months of unemployment in 2011. Tr. 49-50. From February 2009
2 through June 2010 he worked part-time doing payroll work for Wells Accounting
3 Services. Tr. 50-52. In 1996 and 1997 he was in the Navy where he did jobs
4 including sweeping floors and painting. Tr. 53. While in prison he performed
5 various jobs, including: warehouse work, cleaning showers, laundry, working in
6 the kitchen, and mowing lawns. Tr. 53-54. Plaintiff testified that he had difficulties
7 performing these jobs due to impairments such as an inability to concentrate,
8 arguing with the other employees and staff, and not getting along with “anyone.”
9 Tr. 53. Doctors have been treating him for bipolar disorder, OCD, PTSD, major
10 depression, and voices. Tr. 54. Plaintiff has been treated with medication and
11 therapy, but testified that the medication is not helpful. Tr. 54-55.

12 STANDARD OF REVIEW

13 A district court's review of a final decision of the Commissioner of Social
14 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
15 limited: the Commissioner's decision will be disturbed “only if it is not supported
16 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,
17 1158–59 (9th Cir.2012) (citing 42 U.S.C. § 405(g)). “Substantial evidence” means
18 relevant evidence that “a reasonable mind might accept as adequate to support a
19 conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently,
20 substantial evidence equates to “more than a mere scintilla[,] but less than a

1 preponderance.” *Id.* (quotation and citation omitted). In determining whether this
2 standard has been satisfied, a reviewing court must consider the entire record as a
3 whole rather than searching for supporting evidence in isolation. *Id.*

4 In reviewing a denial of benefits, a district court may not substitute its
5 judgment for that of the Commissioner. If the evidence in the record “is susceptible
6 to more than one rational interpretation, [the court] must uphold the ALJ's findings
7 if they are supported by inferences reasonably drawn from the record.” *Molina v.*
8 *Astrue*, 674 F.3d 1104, 1111 (9th Cir.2012). Further, a district court “may not
9 reverse an ALJ's decision on account of an error that is harmless.” *Id.* at 1111. An
10 error is harmless “where it is inconsequential to the [ALJ's] ultimate nondisability
11 determination.” *Id.* at 1115 (quotation and citation omitted). The party appealing
12 the ALJ's decision generally bears the burden of establishing that it was harmed.
13 *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

14 **FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

15 A claimant must satisfy two conditions to be considered “disabled” within
16 the meaning of the Social Security Act. First, the claimant must be “unable to
17 engage in any substantial gainful activity by reason of any medically determinable
18 physical or mental impairment which can be expected to result in death or which
19 has lasted or can be expected to last for a continuous period of not less than twelve
20 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant's impairment must be

1 “of such severity that he is not only unable to do his previous work[,] but cannot,
2 considering his age, education, and work experience, engage in any other kind of
3 substantial gainful work which exists in the national economy.” 42 U.S.C. §
4 1382c(a)(3)(B).

5 The Commissioner has established a five-step sequential analysis to
6 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
7 404.1520(a)(4)(i)-(v); 416.920(a)(4) (i)-(v). At step one, the Commissioner
8 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);
9 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
10 Commissioner must find that the claimant is not disabled. 20 C.F.R. § §
11 404.1520(b); 416.920(b).

12 If the claimant is not engaged in substantial gainful activities, the analysis
13 proceeds to step two. At this step, the Commissioner considers the severity of the
14 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
15 claimant suffers from “any impairment or combination of impairments which
16 significantly limits [his or her] physical or mental ability to do basic work
17 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
18 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
19 however, the Commissioner must find that the claimant is not disabled. *Id.*

1 At step three, the Commissioner compares the claimant's impairment to
2 several impairments recognized by the Commissioner to be so severe as to
3 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §§
4 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
5 severe than one of the enumerated impairments, the Commissioner must find the
6 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

7 If the severity of the claimant's impairment does meet or exceed the severity
8 of the enumerated impairments, the Commissioner must pause to assess the
9 claimant's "residual functional capacity." Residual functional capacity ("RFC"),
10 defined generally as the claimant's ability to perform physical and mental work
11 activities on a sustained basis despite his or her limitations (20 C.F.R. §§
12 404.1545(a)(1); 416.945(a)(1)), is relevant to both the fourth and fifth steps of the
13 analysis.

14 At step four, the Commissioner considers whether, in view of the claimant's
15 RFC, the claimant is capable of performing work that he or she has performed in
16 the past ("past relevant work"). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv).
17 If the claimant is capable of performing past relevant work, the Commissioner
18 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f).
19 If the claimant is incapable of performing such work, the analysis proceeds to step
20 five.

1 At step five, the Commissioner considers whether, in view of the claimant's
2 RFC, the claimant is capable of performing other work in the national economy. 20
3 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a) (4)(v). In making this determination, the
4 Commissioner must also consider vocational factors such as the claimant's age,
5 education and work experience. *Id.* If the claimant is capable of adjusting to other
6 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § §
7 404.1520(g)(1); 416.920(g) (1). If the claimant is not capable of adjusting to other
8 work, the analysis concludes with a finding that the claimant is disabled and is
9 therefore entitled to benefits. *Id.*

10 The claimant bears the burden of proof at steps one through four above.
11 *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir.2010). If
12 the analysis proceeds to step five, the burden shifts to the Commissioner to
13 establish that (1) the claimant is capable of performing other work; and (2) such
14 work “exists in significant numbers in the national economy.” 20 C.F.R. § §
15 404.1560(c); 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir.2012).

16 ALJ’S FINDINGS

17 The ALJ found that Plaintiff met the insured status requirements of the
18 Social Security Act through March 31, 2006. At step one, the ALJ found Plaintiff
19 did engage in substantial gainful activity from February 2009 to February 2010. Tr.
20 21. However, because there has been a continuous 12-month period during which

1 the Plaintiff did not engage in substantial gainful activity, the ALJ proceeded to the
2 next step in the evaluation. Tr. 21-22. At step two, the ALJ found Plaintiff has the
3 following severe impairments: major depressive disorder; post-traumatic stress
4 disorder; obsessive compulsive disorder; alcohol and polysubstance abuse, in
5 remission; and anti-social and schizoid personality traits. Tr. 22. At step three, the
6 ALJ found Plaintiff does not have an impairment or combination of impairments
7 that meets or medically equals the severity of one of the listed impairments in 20
8 C.F.R. Part 404, Subpt. P, App'x 1. Tr. 22. The ALJ then determined Plaintiff has
9 the following RFC:

10 to perform a full range of work at all exertional levels but with the following
11 nonexertional limitations: The claimant is limited to simple, routine and
12 repetitive tasks, as well as some well learned detailed tasks. The claimant's
13 pace would be slow intermittently. The claimant would need additional time
14 to adapt to routine changes. The claimant would work best when away from
the general public, and he should not have any interaction with children or
disadvantaged adults. The claimant can have superficial contact with co-
workers and supervisors, and he should not work in close cooperation with
them.

15 Tr. 24. At step four, the ALJ found Plaintiff is capable of past relevant work as a
16 seaman, bundle tier, and payroll clerk. Tr. 29. Thus, the ALJ concluded Plaintiff
17 has not been under a disability, as defined in the Social Security Act, since May 1,
18 2004 through the date of his decision. Tr. 29.

19 ISSUES

1 The question is whether the ALJ's decision is supported by substantial
 2 evidence and free of legal error. Specifically, Plaintiff asserts: (1) the ALJ erred in
 3 improperly rejecting the opinions of the Plaintiff's treating and examining medical
 4 providers; (2) the ALJ erred in improperly rejecting the claimant's testimony; and
 5 (3) the ALJ erred in failing to conduct an adequate step four analysis. ECF No. 15
 6 at 12-20. Defendant argues: (1) the ALJ properly weighed the medical evidence of
 7 record when determining Plaintiff's RFC; (2) the ALJ articulated well-supported
 8 reasons for finding Plaintiff's subjective allegations not credible; and (3)
 9 substantial evidence supports the ALJ's step four finding because Plaintiff's RFC
 10 allowed him to perform his past relevant work. ECF No. 16 at 4-18.

11 **DISCUSSION**

12 **A. Medical Opinions**

13 There are three types of physicians: "(1) those who treat the claimant
 14 (treating physicians); (2) those who examine but do not treat the claimant
 15 (examining physicians); and (3) those who neither examine nor treat the claimant
 16 [but who review the claimant's file] (nonexamining [or reviewing] physicians)." *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir.2001)(citations omitted).
 17 Generally, a treating physician's opinion carries more weight than an examining
 18 physician's, and an examining physician's opinion carries more weight than a
 19 reviewing physician's. *Id.* If a treating or examining physician's opinion is
 20

1 uncontradicted, the ALJ may reject it only by offering “clear and convincing
2 reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d
3 1211, 1216 (9th Cir.2005). Conversely, “[i]f a treating or examining doctor's
4 opinion is contradicted by another doctor's opinion, an ALJ may only reject it by
5 providing specific and legitimate reasons that are supported by substantial
6 evidence.” *Id.* (citing *Lester v. Chater*, 81 F.3d 821, 830–831 (9th Cir.1995)).
7 “However, the ALJ need not accept the opinion of any physician, including a
8 treating physician, if that opinion is brief, conclusory and inadequately supported
9 by clinical findings.” *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
10 (9th Cir. 2009)(quotation and citation omitted). Additionally, courts have
11 recognized conflicting medical evidence, the absence of regular medical treatment
12 during the period of disability, and the lack of medical support for doctors’ reports
13 based substantially on the claimant’s subjective complaints of pain as specific and
14 legitimate reasons to reject a treating or examining physician’s opinion. *Flaten v.*
15 *Secretary of Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9th Cir. 1995).
16 Plaintiff contends that the ALJ improperly rejected the opinions of his medical
17 providers, including: Mark Cross, PhD, Aaron Anderson, DO, and mental health
18 counselor Carson Carter. ECF No. 15 at 12-20.

19 1. Dr. Cross
20

1 Dr. Cross first examined Plaintiff in February 2009, but did not provide any
2 work related limitations. Tr. 322. In September 2010, he submitted a letter stating
3 that claimant “demonstrate[d] moderate to marked impairment in social judgment
4 and decision making when under pressure/stress.” Tr. 426-23. Dr. Cross also
5 completed a mental medical source statement identifying moderate to marked
6 limitations in areas of work functioning including: the ability to carry out detailed
7 instructions; the ability to maintain attention and concentration for extended
8 periods; the ability to perform activities within a schedule, maintain regular
9 attendance and be punctual within customary tolerances; the ability to work in
10 coordination with or proximity to others without being distracted by them; the
11 ability to complete a normal workday and workweek without interruptions from
12 psychologically based symptoms and to perform at a consistent pace without an
13 unreasonable number and length of rest periods. 426-427. In addition, Dr. Cross
14 found marked to severe limitations in all categories of social interaction except the
15 ability to ask simple questions or request assistance. Tr. 427. The ALJ found that
16 Dr. Cross’s opinion was

17 inconsistent with the routine progress notes, reviewed my Dr. Cross, in
18 which the claimant exhibited improved mood, appropriate affect, intact short
19 and long-term memory, and cooperative behavior. (Ex. 21F/2) In light of the
20 routine progress notes from Central Washington Comprehensive Mental
Health, very little weight can be given to Dr. Cross’s letters and check-the-
box mental capacity forms.

1 Tr. 26. Plaintiff argues that the ALJ summarily rejected the opinion of Dr. Cross
2 without providing adequate reasons. ECF No. 15 at 12-14.

3 When explaining his reasons for rejecting medical opinion evidence, the
4 ALJ must do more than state a conclusion, rather, the ALJ must “set forth his own
5 interpretations and explain why they, rather than the doctors’, are correct.”
6 *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). “This can be done by setting
7 out a detailed and thorough summary of the facts and conflicting clinical evidence,
8 stating his interpretation thereof, and making findings.” *Id.*

9 In support of his rejection of Dr. Cross’ opinion regarding Plaintiff’s
10 limitations, the ALJ cited a single record in which nurse practitioner Lauren Akers
11 noted Plaintiff exhibited improved mood, intact short and long term memory, and
12 cooperative behavior. Tr. 431. The ALJ then cited generally to over 100 pages of
13 medical records, presumably to support his finding that the “routine progress
14 notes” from Central Washington Comprehensive Mental Health were inconsistent
15 with Dr. Cross’ opinion. Tr. 426-532. However, while these records reveal
16 sporadic improvement in Plaintiff’s symptoms, they also contain ample evidence
17 that supports Dr. Cross’s opinion, including: violent outbursts, explosive anger,
18 superior attitude to others, anger, irritability, anxiety, problems concentrating, and
19 troubles with sleep. Tr. 435-36, 438, 440, 453, 459, 471, 478-79. Thus, the ALJ
20 dismissed Dr. Cross’ opinion without providing a detailed and thorough summary

1 of the facts and conflicting evidence. For this reason, the ALJ failed to meet his
2 burden to provide specific and legitimate reasons, supported by substantial
3 evidence, for giving very little weight to the opinion of Dr. Cross.

4 2. Dr. Anderson

5 In June 2011, Dr. Anderson opined in a medical report that Plaintiff was
6 “currently off all meds – not stable for work,” and that this limitation had existed
7 since January 2004. Tr. 425. The ALJ found that

8 Dr. Anderson’s opinion is inconsistent, however, with the unguarded and
9 objective treatment notes from this period. In fact, the claimant told treating
10 nurse practitioner, Kathleen Mack, ARNP, that he “started his medications
11 back in June” (Ex. 22F/2). The claimant told Ms. Mack that he believed that
his antidepressant medication was working, and he agreed to try additional
psychotropic medications. Due to these notable inconsistencies, very little
weight can be given to Dr. Anderson’s opinion.

12 Tr. 27-28. Plaintiff again argues that the ALJ rejected Dr. Anderson’s opinion
13 without providing adequate reasons.

14 The ALJ appears to dismiss Dr. Anderson’s opinion based solely on an
15 alleged discrepancy as to whether Plaintiff was taking medication in June of 2011.
16 Plaintiff reported to Ms. Mack that he began taking his medication sometime “in
17 June,” but it is conceivable that Plaintiff began taking his medication again *after*
18 Dr. Anderson’s report in June 2011. Moreover, the ALJ’s reasoning for rejecting
19 the opinion of Dr. Anderson omitted pertinent statements by Plaintiff to Ms. Mack
20 regarding the efficacy of his medication. Rather than simply stating that his

1 antidepressant medication was working, as indicated by the ALJ, the Plaintiff
2 actually revealed that “he does not believe [his medications] are working for him
3 although he qualifies this to state that his antidepressant seems to be working but
4 nothing else does.” Tr. 485. For these reasons, the court finds this reason for
5 rejecting Dr. Anderson’s opinion, particularly as Plaintiff’s treating physician, is
6 not specific and legitimate, nor is it supported by substantial evidence.

7 3. Carson Carter

8 In November 2008, Plaintiff was evaluated by therapist Carson Carter. Tr.
9 242-45. Mr. Carter opined that Plaintiff’s “usual baseline behavior and his ‘in
10 house jobs’ indicate he can complete tasks and do routine work,” and “[h]is ability
11 to perform is enhanced by taking his medication.” Tr. 244. In addition, Mr. Carter
12 noted that Plaintiff was cooperative, came to treatment, and took medication. Tr.
13 245. The ALJ gave “little weight and consideration” to Mr. Carter’s opinion due to
14 “notable internal inconsistencies.” Tr. 28. Plaintiff argues this was not a valid
15 reason for rejecting Mr. Carter’s opinion. ECF No. 15 at 15-17.

16 As a therapist, Mr. Carter is not an “acceptable medical source” within the
17 meaning of 20 C.F.R. § 416.913(a). Instead, Mr. Carter qualifies as an “other
18 source” as defined in 20 C.F.R. § 416.913(d). *Molina v. Astrue*, 674 F.3d 1104,
19 1111 (9th Cir. 2012). The opinion of an “acceptable medical source” is given more
20 weight than that of an “other source.” SSR 06-03p, 2006 WL 2329939 at *2; 20

1 C.F.R. § 416.927(a). The ALJ need only provide “germane reasons” for
2 disregarding Mr. Carter’s opinion. *Molina*, 674 F.3d at 1111. However, the ALJ is
3 required to “consider observations by nonmedical sources as to how an impairment
4 affects a claimant's ability to work.” *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th
5 Cir. 1987).

6 The ALJ appears to cite two “internal inconsistencies” as reasons for
7 discrediting Mr. Carter’s opinion. First, the ALJ refers to an alleged inconsistency
8 between Mr. Carter’s statements that Plaintiff could “complete tasks and do routine
9 work” while in prison, and his opinion that Plaintiff had a marked limitation in his
10 ability to respond appropriately to and tolerate the pressures and expectations of a
11 normal workday. Tr. 28. Second, the ALJ refers to an inconsistency between the
12 same finding of marked limitation in Plaintiff’s ability to respond to a normal
13 workday, and the Plaintiff’s cooperation and compliance with treatment and
14 medication. *Id.*

15 These alleged “internal inconsistencies” within Mr. Carter’s opinion do not,
16 standing alone, satisfy the ALJ’s burden to provide “germane reasons” for
17 rejecting Mr. Carter’s opinion. *See e.g., Tonapetyan v. Halter*, 242 F.3d 1144, 1149
18 (9th Cir. 2001)(an opinion may be rejected if based on a claimant’s subjective
19 complaints which were properly discounted); *Lewis v. Apfel*, 236 F.3d 503, 511
20 (9th Cir. 2001)(an ALJ may discount lay testimony if it conflicts with medical

1 evidence). Plaintiff's ability to perform routine jobs in an "in house" prison setting
2 does not mean he can handle the pressures of a normal workday outside of prison.
3 Plaintiff himself testified that he tried six or seven different jobs while in prison,
4 but was only able to stay in each job for a limited period of time due to his
5 impairments. Tr. 53-54. Moreover, as argued by the Plaintiff, "he could be
6 completely cooperative with treatment and medication, yet still be markedly
7 limited in his ability to handle work pressures." ECF No. 15 at 16. The ALJ did not
8 adequately justify his rejection of Mr. Carter's opinion.

9 In this case, the ALJ improperly rejected the opinions of Dr. Cross, Dr.
10 Anderson, and Mr. Carter, without providing specific and legitimate reasons
11 supported by substantial evidence. As a result, remand is required for proper
12 analysis of these opinions.

13 **B. Adverse Credibility Determination**

14 In social security proceedings, a claimant must prove the existence of
15 physical or mental impairment with "medical evidence consisting of signs,
16 symptoms, and laboratory findings." 20 C.F.R. §§ 416.908; 416.927. A claimant's
17 statements about his or her symptoms alone will not suffice. *Id.* Once an
18 impairment has been proven to exist, the claimant need not offer further medical
19 evidence to substantiate the alleged severity of his or her symptoms. *Bunnell v.*
20 *Sullivan*, 947 F.2d 341, 345 (9th Cir.1991) (en banc). As long as the impairment

1 “could reasonably be expected to produce [the] symptoms,” the claimant may offer
2 a subjective evaluation as to the severity of the impairment. *Id.* This rule
3 recognizes that the severity of a claimant's symptoms “cannot be objectively
4 verified or measured.” *Id.* at 347 (quotation and citation omitted).

5 If an ALJ finds the claimant's subjective assessment unreliable, “the ALJ
6 must make a credibility determination with findings sufficiently specific to permit
7 [a reviewing] court to conclude that the ALJ did not arbitrarily discredit claimant's
8 testimony.” *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir.2002). In making this
9 determination, the ALJ may consider, *inter alia*: (1) the claimant's reputation for
10 truthfulness; (2) inconsistencies in the claimant's testimony or between his
11 testimony and his conduct; (3) the claimant's daily living activities; (4) the
12 claimant's work record; and (5) testimony from physicians or third parties
13 concerning the nature, severity, and effect of the claimant's condition. *Id.* Absent
14 any evidence of malingering, the ALJ's reasons for discrediting the claimant's
15 testimony must be “specific, clear and convincing.” *Chaudhry v. Astrue*, 688 F.3d
16 661, 672 (9th Cir.2012) (quotation and citation omitted).

17 There has been no suggestion of malingering on the part of the Plaintiff in
18 this case. Plaintiff contends that the ALJ failed to provide clear and convincing
19 reasons for discrediting his own subjective complaints. ECF No. 15 at 17–18. The
20 ALJ found that “[o]verall, the limitations reported by the claimant are inconsistent

1 with the claimant's testimony, activities of daily living, and objective findings in
2 the record." Tr. 25. First, the ALJ found the Plaintiff's claims that he was unable to
3 concentrate or complete tasks were inconsistent with objective findings in the
4 record. *Id.* Subjective pain testimony may not be rejected solely because it is not
5 corroborated by objective medical findings, however, medical evidence is a
6 relevant factor in determining the severity of a claimant's disabling effects. *Rollins*
7 *v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). In support of his finding, the ALJ
8 cited one mental status examination with Dr. Roland Dougherty during which the
9 Plaintiff completed concentration, attention, spelling, and math tests "accurately
10 and easily." Tr. 25 (citing Tr. 362). The court finds that, while properly considered
11 by the ALJ, this singular citation indicating an ability by Plaintiff to concentrate
12 and complete certain "sub-tests" does not rise to the level of substantial evidence
13 supporting a clear and convincing reason to discount the Plaintiff's testimony as to
14 limitations to his ability to work on a regular and continuing basis.

15 Additionally, the ALJ concluded that the Plaintiff's daily activities were
16 inconsistent with his claimed limitations, and therefore undermined his credibility.

17 Tr. 25. Evidence about daily activities is properly considered in making a
18 credibility determination. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

19 However, it is well-settled that a claimant need not be utterly incapacitated in order
20 to be eligible for benefits. *Id.*; *see also Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir.

1 2007) (“the mere fact that a plaintiff has carried on certain activities...does not in
2 any way detract from her credibility as to her overall disability.”) Thus, Plaintiff’s
3 daily activities may be grounds for an adverse credibility finding if a claimant is
4 able to spend a substantial portion of his day engaged in pursuits involving the
5 performance of physical functions that are transferable to a work setting. *Orn*, 495
6 F.3d at 639.

7 In this case, the ALJ found Plaintiff was independent in self-care, household
8 chores, home repairs, shopping, bill paying and driving. Tr. 25. Plaintiff reported
9 he could go out on his own on a daily basis, take medications without reminders,
10 and care for household pets. *Id.* The ALJ also relied on statements by Plaintiff’s
11 domestic partner, David Wells, indicating that despite his claim of impaired
12 concentration, Plaintiff read about an hour a day and wrote poetry. Tr. 25, 50, 198.
13 Finally, the ALJ cited a report by Plaintiff that he was in the process of buying a
14 home and concluded that “the ability to engage in such a complex transaction is
15 also inconsistent with [Plaintiff’s] allegations of disabling mental impairments. Tr.
16 25 (citing Tr. 435). Overall, the ALJ concluded that these “numerous activities are
17 inconsistent with a high degree of functioning.” Tr. 25.

18 The court finds the ALJ failed to make specific findings as to how Plaintiff’s
19 daily activities contradict his testimony. Most glaringly, the ALJ erred in failing to
20 specifically address Plaintiff’s testimony that he has difficulty dealing with people

1 and interacting appropriately with authority figures. Tr. 52-53, 55. The ALJ “must
2 specifically identify the testimony she or he finds not to be credible and must
3 explain what evidence undermines the testimony.” *Holohan v. Massanari*, 246
4 F.3d 1195, 1208 (9th Cir.2001). Here, the ALJ made no specific findings as to
5 Plaintiff’s testimony regarding his alleged interpersonal limitations, which cannot
6 be considered harmless particularly in light of the following testimony from the
7 vocational expert:

8 ALJ: You also had a chance to listen to the claimant’s testimony about his
9 mental health issues. Would a person with the limitations he described be
10 able to maintain employment and sustain employment in a competitive
11 atmosphere eight hours a day, five days a week for a 40 hour work schedule?

12 VE: Well I think it would be difficult given the interpersonal problems that
13 [Plaintiff] reports; you know, problems getting along, arguing.... I think the
14 interpersonal challenges would probably play out in such a way that he
15 would have some kind of conflict that would result in difficulty retaining
16 particular jobs, and probably having a series of relatively short term jobs.

17 Tr. 69-70. In addition, the ALJ failed to make specific findings that any of
18 Plaintiff’s activities meet the standard for transferable work skills. For all of these
19 reasons, the ALJ’s conclusion that Plaintiff’s daily activities undermine his
20 credibility is not supported by the record.

The court finds the ALJ’s reasons for making an adverse credibility finding
in this case were not specific, clear and convincing. On remand, the ALJ must
make a proper determination of credibility supported by substantial evidence.

C. RFC

ORDER GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT
AND DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT ~

1 A claimant's RFC is what the claimant can still do despite his limitations.
2 *Smolen v. Chater*, 80 F.3d 1273, 1291 (9th Cir. 1996)(citing 20 C.F.R. §
3 404.1545(a)). Plaintiff argues that the ALJ gave great weight to the opinion of Dr.
4 Patricia Kraft, yet he failed to include all of her moderate limitations in the RFC.
5 ECF No. 15 at 19. Dr. Kraft found moderate limitations in Plaintiff's ability to:
6 maintain attention and concentration for extended periods; work in coordination
7 with or proximity to others without being distracted by them; *complete a normal*
8 *workday and workweek without interruptions from psychologically based*
9 *symptoms* and to perform at a consistent pace without an unreasonable number of
10 rest periods; interact appropriately with the general public; get along with
11 coworkers or peers without distracting them or exhibiting behavioral extremes;
12 respond appropriately to changes in the work setting. Tr. 413-15 (emphasis added).

13 The ALJ's assessment of Plaintiff's RFC did include most of the limitations
14 identified by Dr. Kraft in the RFC, with the glaring exception of a moderate
15 limitation in the ability to complete a normal workday and workweek without
16 interruptions from psychologically based symptoms. Tr. 24. Any error regarding
17 the limitations the ALJ included in the RFC would be harmless because the RFC
18 would adequately capture Plaintiff's moderate limitations. *See Stubbs-Danielson v.*
19 *Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008)(an ALJ's assessment of a claimant
20 adequately captures restrictions related to concentration, persistence or pace where

1 the assessment is consistent with restrictions identified in medical testimony).

2 However, the ALJ failed to include any limitation in the RFC as to interruptions in
3 the workweek or workday from psychologically based symptoms, and thus any
4 error in omitting this limitation cannot be considered harmless. This is particularly
5 true in light of testimony from the vocational expert that

6 those limitations – well particularly the one involving moderate limitation
7 completing a normal day or work week, maintaining a regular pace without
8 unreasonable numbers or lengths of rest periods, would result in some fairly
9 unacceptable problems with keeping on task, getting the required amount of
10 productivity completed. That probably is [sic] conjunction with moderate
11 limitation in attention and concentration. So I think that those issues in
12 particular would make it not possible for a worker to sustain competitive
13 employment.

14 Tr. 72.

15 In addition to Dr. Kraft's opinion, as determined above, the ALJ erred in this
16 case by failing to provide a proper rationale for rejecting the opinions of treating
17 and examining medical professionals Dr. Cross, Dr. Anderson, and Mr. Carter. On
18 remand the ALJ should reassess the RFC and, if necessary, reconsider the
19 hypothetical posed by the ALJ to ensure it properly included all of Plaintiff's
20 psychological limitations supported by substantial evidence. *See Osenbrook v.*
Apfel, 240 F.3d 1157, 1165 (9th Cir. 2001)("[a]n ALJ is free to accept or reject
restrictions in a hypothetical question that are not supported by substantial
evidence.")

CONCLUSION

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~

1 The ALJ's decision was not supported by substantial evidence and free of
2 legal error. Remand is appropriate when, like here, a decision does not adequately
3 explain how a conclusion was reached, "[a]nd that is so even if [the ALJ] can offer
4 proper post hoc explanations for such unexplained conclusions," for "the
5 Commissioner's decision must stand or fall with the reasons set forth in the ALJ's
6 decision, as adopted by the Appeals Council." *Barbato v. Comm'r of Soc. Sec.*, 923
7 F.Supp. 1273, 1276 n. 2 (C.D.Cal.1996)(citations omitted). On remand, the ALJ is
8 directed to reevaluate the opinions of Dr. Cross, Dr. Anderson, and Mr. Carter, and
9 provide legally sufficient reasons for rejecting these opinions supported by the
10 requisite evidence. Additionally, on remand the ALJ will reconsider the credibility
11 finding, and provide valid reasons supported by substantial evidence. If necessary,
12 the ALJ will make a new RFC determination. The court expresses no opinion as to
13 the outcome of the ultimate disability determination on remand.

14 **ACCORDINGLY, IT IS HEREBY ORDERED:**

15 1. Plaintiff's Motion for Summary Judgment, ECF No. 15, is **GRANTED**.

16 The matter is remanded to the Commissioner for additional proceedings
17 pursuant to sentence four 42 U.S.C. § 405(g).

18 2. Defendant's Motion for Summary Judgment, ECF No. 16, is **DENIED**.

19 The District Court Executive is hereby directed to enter this Order and
20 provide copies to counsel.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~

1 **DATED** January 29th, 2014.

2 s/Fred Van Sickle
3 Fred Van Sickle
4 Senior United States District Judge